made liable for any antecedent debt if the guarantee so expressed.

On going through the guarantee in this present appeal I am of the view that it is within the contemplation of the parties that the guarantors are to be saddled with the liabilities incurred not only after but also before the signing of the guarantee. This is the plain meaning of the words used, and an appreciation of this plain meaning inevitably destroys the contention of the guarantors advanced in this appeal.

In consequence thereof I allow the appeal and make an order in terms of the prayer as in para 1(a)(ii) of the summons-in-chambers. Costs to the plaintiff.

Appeal allowed.

Solicitors: *Yip Yeo & Nasrim*; *HS Lim, Teo & Partners.*

Reported by *Prof Ahmad Ibrahim*

Mansor bin Mat Tahir v Kadi Daerah Pendang Kedah & Anor

HIGH COURT (ALOR SETAR) – ORIGINATING MOTION NO 32-09-1987
MOHAMED ARIFF J
12 SEPTEMBER 1987 AND 9 JUNE 1988

Administrative Law – Application for mandamus – Application to register Muslim marriage solemnized in Thailand – Whether High Court has jurisdiction – Duty of Kadi not a purely ministerial act requiring no judgment or discretion on his part – Case still pending in Kadi's court – Existence of alternative remedy – Female party to marriage subsequently obtaining a divorce and marrying another person – Original foreign marriage ceased to be in existence – Rules of the High Court 1980, O 53 – Specific Relief Act 1950, ss 44 & 45

Islamic Law – Application to register Muslim marriage solemnized in Thailand – Exercise of discretion and judgment by Kadi – Case still pending – Application for mandamus refused – Islamic Family Law Enactment 1984 (Kedah), ss 23, 25 & 108 – Federal Constitution, Ninth Schedule

In this case the applicant had applied for an order of mandamus against the Kadi of Daerah Pendang, Kedah and the Chief Registrar of Marriage, Divorce and Revocation, Kedah to order them to register a marriage between the applicant and one Normala bte Jusoh solemnized in Patani, Thailand according to Muslim rites on 15 January 1986. The applicant had applied for registration of the marriage and the Kadi had fixed a date for hearing in order to get further details of the marriage. The applicant was advised, however, that it was not necessary to have a hearing as all that was necessary was for him to attend before the Kadi to register the marriage. The applicant withdrew the earlier application but subsequently re-applied to have his marriage registered. The case was pending in the Kadi's court. In the meantime, Normala bte Jusoh had obtained a 'taklik' divorce from the Kadi's office in Senggara, Thailand, and then subsequently successfully applied to have the divorce confirmed and registered in the Kadi's court, Pendang. Later she married her former fiancee, Osman bin Omar, in Thailand and Osman bin Omar applied to have the marriage registered. This application was also pending. Leave to apply for an order for mandamus was granted to the applicant and the application was heard in the High Court.

Held, dismissing the application:

(1) The application for registration of the marriage had not been disposed of in the Kadi's court and even if a decisioon had been made against the applicant, the applicant had a remedy to appeal to the Syariah Court of Appeal.

(2) It cannot be truly ascertained in this case that both the respondents have not performed their duty as 'an imperative ministerial character involving no judgment or discretion on their part'.

(3) This case does not fall within the jurisdiction of the High Court to issue an order of mandamus because the parties are Muslims and it involves the personal law of Muslims both under the Kedah State Constitution as well as the Federal Constitution.

(4) Even if the court were to issue an order of mandamus to compel the respondents to register the marriage, it would only be a case of an academic and judicial exercise because there is no more foreign marriage between the applicant and Normala as such to be registered.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 420 of 1987.]

Cases referred to

1 *Loh Wai Kong* v *Government of Malaysia & Ors* [1978] 2 MLJ 175 (folld)
2 *Koon Hoi Chow* v *Pretam Singh* [1972] 1 MLJ 180 (refd)
3 *Ng Bee* v *Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ 2733 (refd)

Legislation referred to

Federal Constitution Ninth Schedule
Islamic Family Law Enactment 1984 (Kedah) ss 20(4), 23, 25, 108
Kedah State Constitution art 33(B)(1)
Rules of the High Court 1980 O 83
Specific Relief Act 1950 ss 44, 45

Ahmad Farid for the applicant.
Abdul Malik bin Haji Ishak (State Legal Adviser, Kedah) for the respondents.

Cur Adv Vult

Mohamed Ariff J: This is an appeal against the decision of the High Court, Alor Setar dismissing an application by one Mansor bin Mat Tahir, the applicant, for an order of mandamus under O 53 of the Rules of the High Court 1980 against the Kadi of Daerah Pendang, Kedah as the first respondent and the Chief Registrar of Marriage,

Divorce and Revocation, Kedah as the second respondent.

Facts of the case

On 26 March 1987, the applicant applied for leave of the High Court pursuant to O 53 r 1(1) to apply for an order of mandamus against the first and second respondents to order them to register a marriage between the applicant and one Normala bte Jusoh solemnized in Patani, Thailand according to Muslim rites on 15 January 1986. In his application for leave to apply for an order of mandamus, the applicant stated the relief and the grounds he sought for which read as follows. The relief sought is:

(a) An order of mandamus to order the Kadi, the district of Pendang, or Chief Registrar of Marriage, Divorce and Revocation to register the foreign marriage between the applicant, Mansor bin Mat Tahir and Normala bte Jusoh solemnized on 15 January 1986 in Patani, Thailand according to Muslim rules.
(b) Such further and other reliefs as this honourable court deems fit.

The grounds upon which the said relief is sought are:

(a) Since returning to Malaysia the applicant and his wife have been forced to live separately by the family of the wife.
(b) The Kadi as the ex-officio Registrar of Marriage, Divorce and Revocation in the district of Pendang has refused to register the marriage.
(c) The Kadi has refused to accept the application for registration made by the applicant pursuant to s 23 of the Islamic Family Enactment 1979.
(d) The applicant will lose his conjugal rights to be with his lawfully wedded wife if his marriage is not registered.
(e) The applicant has complied with all the requirements of s 23 of the said Enactment.

In the affidavit accompanying his application for leave to apply for an order of mandamus, the applicant stated, inter alia, the following:

I, Mansor bin Mat Tahir (NRIC No 7113904) of Kampung Bukit Raya Dalam, Mukim Bukit Raya, 06700 Pendang, Kedah do solemnly and sincerely affirm and say as follows:

(1) I am the applicant abovenamed and domiciled in the State of Kedah, Malaysia.

(2) The first respondent is the ex-officio Registrar of Marriage, Divorce and Revocation and the second respondent is the Chief Registrar of Marriage, Divorce and Revocation appointed under s 20 of the Islamic Family Enactment 1979 (hereinafter referred to as 'the said Enactment').

(3) On 15 January 1986, I and Normala bte Jusoh (NRIC No A1455784) of Kampung Bukit Raya Dalam, Pendang, Kedah were married in Patani, Thailand according to Muslim rites. A copy of the marriage certificate issued by the Majlis Ugama Islam, Changwad, Patani, Thailand is now produced annexed herewith and marked as 'M'.

(4) Upon my return to the State of Kedah, Malaysia, I immediately attended before the first respondent to register my marriage whereupon the first respondent instituted proceedings to have the said marriage validated vide Kes Mal (P) No 2/1986.

(5) Thereafter I went to get the advice of a solicitor at M/s Radzi Sheikh Ahmad, Noor & Farid, Alor Setar, with the aim of appointing the said solicitor to act for me. However, the said solicitor advised me that under the said Enactment 1979, it was not necessary to institute proceedings in the Kadi's court, but that I had to attend before the first respondent to register my marriage.

(6) On 30 March 1986, my solicitors wrote to the first respondent explaining the position under s 23 of the said Enactment and requesting that my marriage be registered. I personally handed the aforesaid letter to the Kadi's office at Pendang and also produced my marriage certificate together with the duly filled form for registration of my marriage. A photocopy each of the aforesaid letter and the form are now produced and annexed herewith marked 'M1' and 'M2'.

(7) On 1 April 1986, my solicitors again wrote to the first respondent at Pendang requesting for withdrawal of the suit Kes Mal (P) No 2/1986, and also enclosed therein photocopies of the marriage registration form and the marriage certificate.

(8) By letter dated 27 April 1986, the first respondent at Pendang replied to the aforesaid letter informing my solicitors that he could not accept the application for registration of the marriage by virtue of s 25(6) of the said Enactment. A photocopy of the said letter is now produced and annexed herewith marked 'M3'.

(9) On 30 April 1986, my solicitors again wrote to the first respondent explaining the provision of ss 23 and 26 of the said Enactment. A photocopy of the said letter is now produced and annexed herewith marked 'M4'.

(10) By a letter dated 13 May 1986 the first respondent again rejected the applicant's application for registration of the marriage. A photocopy of the said letter is now produced and annexed hereto marked 'M5'.

(11) On 8 October 1986, when I went again before the first respondent at Pendang to inquire about the registration of my marriage, the first respondent advised me to file a fresh application under s 23 of the said Enactment. Thereafter on 11 October 1986, I instructed my solicitors to write to the first respondent enclosing therein photocopies of the application form and the marriage certificate together with the filing fees therefore; a photocopy of the said letter is now produced and annexed herewith marked 'M6'.

(12) On 10 February 1987, I received a notice from the Registrar, Kadi's court at Pendang, informing me that the court had fixed a hearing date on 26 February 1987 for the case registered as Kes Mal (P) No 6/87 although no claim or summons was filed by me or my solicitors. A photocopy of the said notice is now produced and annexed hereto marked 'M7'.

(13) On 26 February 1987, I attended proceedings at the Kadi's court at Pendang but no decision was made and subsequently it was adjourned to 21 July 1987.

(14) I am now advised and verily believe that under s 23 of the said Enactment, my marriage should be registered as of right.

(15) Wherefore I pray for an order in terms of the application herein.

In a joint affidavit in reply the first and second respondents Sheikh Nek Ali bin Nek Ahmad, Kadi Daerah Pendang, Kedah and Dato' Sheikh Mohd Yusof bin Haji Ismail, Chief Registrar of Marriage, Divorce and Revocation, Kedah state, inter alia:

(3) It has been read and explained to us a copy of the affidavit of the applicant abovenamed affirmed on 29 June 1987.

(4) We crave leave of this honourable court to refer to the affidavit of the applicant abovenamed affirmed on 29 June 1987.

(5) We admit paras 1 and 2 of the applicant's affidavit.

(6) We are advised and verily believe that Normala bte Jusoh, a Form 5 student of Sekolah Menengah Pendang, Kedah, was kidnapped by the applicant on 14 January 1987 at 7 am. Jusoh bin Man, the father of Normala bte Jusoh lodged a police report to this effect. A photostat of the certified true copy of the police report is annexed hereto and marked as 'KDP 1'.

(7) We are advised and verily believe that Jusoh bin Man, the father of Normala bte Jusoh was subsequently informed by the senior assistant teacher of Sekolah Menengah Pendang that his daughter (Normala bte Jusoh) was absent from school for ten days without reason. A photostat copy of the letter from the senior assistant teacher is annexed hereto and marked as 'KDP 2'. A photostat translation of the said letter by the sworn interpreter of the High Court is annexed hereto and marked as 'KDP 2A'.

(8) We admit para 3 of the applicant's affidavit but we are doubtful as to whether the marriage was solemnized in accordance to Hukum Syarak because the marriage was solemnized through Wali Tahkim. By Wali Tahkim we meant the bride can on her own accord appoint the Imam as her Wali Tahkim and on her own accord request the Imam to marry her to the man of her own choice. We are advised and verily believe that because Normala bte Jusoh was kidnapped on 14 January 1986, she could not therefore have married the applicant willingly. We state that the marriage certificate referred therein contain a repudiatory clause enabling the Imam or the province Islamic committee division to accept Normala's complaint when the parties do not live as husband and wife for more than six months (provided there is a witness to her complaint) and the marriage shall then be repudiated by one talak. And every time the applicant revert to Normala without her consent, she shall be repudiated by one talak. A photostat copy of the translation of the marriage certificate by the sworn interpreter of the High Court, Alor Setar is annexed hereto and marked as 'KDP 3A'.

(9) We are advised and verily believe that the applicant and Normala bte Jusoh did not live together as husband and wife after the marriage. In fact, Normala bte Jusoh stayed with her father, viz Jusoh bin Man after the marriage for a period exceeding six months.

(10) We admit para 4 of the applicant's affidavit and state that *the applicant had on 27 January 1986 applied* for registration of his marriage at the applicant's application, the first Kes Mal (P) 2/86 and fixed the case for hearing on 13 May 1986 in order to obtain further detail of the said marriage within the meaning of s 23(1)(b) of the Islamic Family Enactment 1979. This is solely because of the chequered history of the parties to the marriage in particular the fact that Normala bte Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized.

(11) We are advised and verily believe that the applicant through his counsel M/s Radzi Sheikh Ahmad, Noor & Farid had on 1 April 1986 withdrew Kes Mal (P) 2/86. The first respondent's predecessor had on 27 April 1986 approved the withdrawal of Kes Mal (P) 2/86. A photostat copy of the letter dated 1 April 1986 from M/s Radzi Sheikh Ahmad, Noor & Farid withdrawing Kes Mal (P) 2/86 is annexed hereto and marked as 'KDP 4'. (A photostat copy of the first respondent's predecessor's letter dated 27 April 1986 approving the withdrawal of Kes Mal (P) 2/86 is annexed hereto and marked as 'KDP 5'.)

(12) We have no knowledge of para 5 of the applicant's affidavit.

(13) We are advised and verily believe that on 5 September 1986 Normala bte Jusoh obtained a divorce comprising one talak from the applicant on the basis of her complaint of 'taklik' (repudiatory act) at the Kadi's office at the district of Chenak in the province of Senggora, Thailand. A photostat copy of the divorce certificate vide Vol 24, No 1199 is annexed hereto and marked as 'KDP 6A'.

(14) On 21 January 1987 armed with the divorce certificate Normala bte Jusoh applied to the Kadi's court at Pendang to confirm her divorce. Her application was duly registered as Kes Mal (P) 5/87. The first respondent fixed the date of hearing on 7 April 1987 at the Kadi's court, Pendang. On the date of hearing (7 April 1987) the first respondent adjourned the matter till 28 July 1987 because of the High Court case (OM 32-09-87). At that time leave was not granted to the applicant under O 53 r 1(1) of the Rules of the High Court 1980. To date Kes Mal (P) 5/87 has been adjourned sine die.

(15) On 5 February 1987 the applicant re-applied to register his marriage to Normala bte Jusoh at the Kadi's office at Pendang. The application was duly registered as Kes Mal (P) 6/87 and fixed for hearing by the Kadi's court at Pendang on 26 Febraury 1987 in order to obtain further detail of the said marriage within the meaning of s 23(1)(b) of the Islamic Family Enactment 1979. This is solely because of the chequered history of the parties to the marriage, in particular the fact that Normala bte Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized.

(16) On 26 February 1987 the hearing of Kes Mal (P) 6/87 was conducted and was partly heard and adjourned for continued hearing on 21 July 1987.

(17) On 7 April 1987 the applicant applied for adjournment of Kes Mal (P) 6/87 without assigning any reason thereto. The first respondent approved the application for an adjournment. (A photostat copy of the applicant's

request for an adjournment of Kes Mal (P) 6/87 is annexed hereto and marked as 'KDP 7'. A photostat copy of the translation is annexed hereto and marked as 'KDP 7A'.)

(18) We are advised and verily believe that this honourable court has no jurisdiction to adjudicate on this matter as this application relates to the Islamic religion (in particular registration of foreign marriage) pending before the Kadi's court at Pendang. The Pendang Kadi's court is capable of adjudicating Kes Mal (P) 6/87.

(19) We are further advised and verily believe that in the event the applicant is unsuccessful in his attempt at registering the marriage at the Kadi's court at Pendang (vide Kes Mal (P) 6/87) there is an available specific and adequate legal remedy for him, viz the right of appeal to the Court of Appeal as provided for under s 108 of the Islamic Family Enactment 1979.

(20) We are advised and verily believe that Kebawah Duli Yang Maha Mulia Tuanku Sultan Kedah Darulaman is the head of Muslim religion in the state and the Majlis Ugama Islam Kedah constituted under the Administration of Muslim Law Enactment No 9 of 1962 shall continue to aid and advise Kebawah Duli Yang Maha Mulia Tuanku Sultan Kedah Darulaman in matters relating to the Muslim religion in the state.

(21) We admit paras 6, 7, 8, 9, 11 and 13 of the applicant's affidavit.

(22) Save that there was a letter dated 13 May 1986 by the first respondent's predecessor as stated in para 10 of the applicant's affidavit, we state that the applicant's matter vide Kes Mal (P) 6/87 is still pending and the hearing has been adjourned on the request of the applicant.

(23) Save that Kes Mal (P) 6/87 was fixed for hearing on 26 February 1987, we have no knowledge of the assertions in para 12 of the applicant's affidavit.

(24) In the interim period, Normala bte Jusoh married her fiancee Osman bin Omar in the Mukim of Bena, district of Chenak, province of Senggora, Thailand on the 6 of Rejab, 1407 Hijrah (equivalent to 6 March 1987) with $3,684 as dowry in cash and expenses. Normala's marriage to Osman bin Omar had the blessing of her father. Jusoh bin Man officiated as Wali Nikah (marriage guardian) in the marriage ceremony. A photostat copy of the marriage certificate between Normala bte Jusoh and Osman bin Omar vide Jilid 12 is annexed hereto and marked as 'KDP 8'. A photostat copy of the translation of the marriage certificate by the sworn interpreter of the High Court Alor Setar vide Vol 12 between Normala bte Jusoh and Osman bin Omar is annexed hereto and marked as 'KDP 8A'.

(25) We are advised and verily believe that on 27 May 1987 Osman bin Omar made an application at the Kadi's office, Pendang to register his marriage to Normala bte Jusoh. The first respondent duly registered as Kes Mal 28/87. The date of hearing has yet to be fixed. A photostat copy of the letter dated 27 May 1987 from Osman bin Omar is annexed hereto and marked as 'KDP 9'.

(26) We are advised and verily believe that Osman bin Omar and Normala bte Jusoh lived happily as husband and wife till today. And that on 3 July 1987 Normala bte Jusoh had a miscarriage while carrying the child of Osman bin Omar. We are further advised and verily believe that Normala bte Jusoh is presently in her early state of pregnancy (also carrying the child of Osman bin Omar).

(27) Save that Kes Mal (P) 2/86 was discontinued for hearing, we have no knowledge of the assertions in para 14 of the applicant's affidavit.

(28) In regard to para 15 of the applicant's affidavit, we are advised and verily believe that Normala bte Jusoh on her own accord decided to stay with her father on her return to Malaysia. And that by effluxion of time and by the events that transpired subsequently, she is currently the lawful wedded wife of Osman bin Omar.

(29) In regard to para 16 of the applicant's affidavit, we are advised and verily believe that s 23 of the Islamic Family Enactment 1979 does not confer registration of foreign marriages in Kedah as of right but rather subject to the following conditions, viz (a) that the foreign marriage is validly contracted outside the state in accordance to Hukum Syarak; (b) that the registrar is satisfied that the marriage had been solemnized; (c) that the parties are required to give any detail as required by the registrar; and (d) that the parties had filled in the necessary forms as provided therein.

(30) We pray that the applicant's application be dismissed with costs.

(31) We also pray for such other relief or order as this honourable court may be pleased to make.

Leave to apply for an order of mandamus against both respondents having been granted by the High Court on 16 June 1987, the applicant thereafter proceeded to apply for the said order by way of originating motion made on 26 March 1987.

In his further affidavit filed on 8 September 1987, the applicant states, inter alia, as follows:

(1) This affidavit is affirmed in amplification to my earlier affidavit affirmed on 25 March 1987.

(2) It has been read and explained to me the contents of the affidavit of the first and second respondents abovenamed affirmed on 24 August 1987 and filed herein (hereinafter referred to as 'as affidavit in reply').

(3) I crave leave to refer to the affidavit in reply of the first and second respondents.

(4)(i) I deny para 6 of the affidavit in reply alleging that I did on 14 January 1986 kidnap Normala bte Jusoh. I wish to state that it was on Normala's suggestion that we eloped to Patani, Thailand to get married. A photocopy of the letter from Normaala to me is now produced and annexed hereto marked 'MMT-1'.

(ii) I further state that after my marriage to Normala, we stayed at a friend Jusoh's house at Patani for about 11 days whereat our marriage was consummated and thereafter Normala was pregnant. Upon our return Normala had an abortion.

(iii) I also wish to state that Normala had on her own free will followed me to Patani, and that she voluntarily consented to marry me. A photocopy of a letter sent to her family is now produced and annexed hereto marked 'MMT-2'.

(iv) Further I state that immediately upon our return, we surrendered ourselves to the police at Pendang. There Normala was forcibly separated from me by her father and family although she strongly objected to the same.

(v) Since then Normala and I have been forced to live separately by her family.

(5) I have no knowledge of para 7 of the affidavit in reply.

(6) As regards para 8 of the affidavit in reply I state that my parents had on two (2) occasions approached Normala's family with a view to asking for her hand in marriage but her parents had on both occasions refused the same. I further state that because of her parents' refusal Normala and I decided to go to Thailand to get married by Wali Tahkim.

(7) I deny para 9 of the affidavit in reply and repeat para 4 above.

(8) As regards para 10 of the affidavit in reply I am advised and verily believe that there is no such provision under the Islamic Family Enactment 1979 for proceedings as instituted by the first respondent's predecessor. In fact the first respondent's predecessor turned down the application for registration of my marriage giving s 25(6) as the reasons therefor.

(9) I admit para 11 of the affidavit in reply.

(10) I have no knowledge of paras 13 and 14 of the affidavit in reply.

(11) As regards paras 15, 16, 17 and 22 of the affidavit in reply, I state that on 5 February 1987 the first respondent urged me to put in a fresh application for the registration of my marriage which I did. Subsequently I was informed that the said application was again registered but this time as Kes Mal (P) 6/87 and a hearing date was duly fixed on 26 February 1987. I was present in court together with my counsel who addressed the court that it was not necessary for the case to be heard. The case was adjourned without any witnesses being called. On 7 April 1987, I again instructed my solicitors to write to the court to withdraw the case. A photocopy of the letter dated 7 April 1987 is now produced and annexed hereto marked 'MMT-3'.

(12) As regards paras 18, 19 and 20 of the affidavit in reply I am advised and verily believe that I have no case pending in the Kadi's court at Pendang.

(13) As regards para 24 of the affidavit in reply I wish to state that upon being informed that Normala had remarried, I made a complaint to the Yang di-Pertua, Majlis Ugama Islam Negeri Kedah about the said marriage. A photocopy of the said letter is now produced and annexed hereto marked 'MMT-4'.

(14) I have no knowledge of paras 25 and 26 of the affidavit in reply.

(15) I deny para 15 of the affidavit in reply and repeat para 4 above.

(16) I am advised and verily believe that under s 23 of the Enactment, my marriage to Normala should be registered as of right.

(17) Wherefore I pray for an order in terms of the application herein.

In their further affidavit filed on 9 September 1987, the first and second respondents stated, inter alia, as follows:

(3) It has been read and explained to us a copy of the further affidavit of the applicant abovenamed affirmed on 7 September 1987.

(4) We crave leave of this honourable court to refer to the further affidavit of the applicant abovenamed affirmed on 7 September 1987.

(5) In regard to para 4(i) of the applicant's further affidavit, we deny that it was at Normala bte Jusoh's suggestion that they (applicant and Normala bte Jusoh) eloped to Patani. We are advised and verily believe that she was kidnapped by the applicant and forcibly taken to Patani and the undated letter referred therein was written by Normala bte Jusoh under threat of death and that it was the applicant who forced her to write the said letter. In her own words (in the explanatory note) she said, 'Saya juga telah di ugut, sekiranya saya tidak menulis surat ini saya akan di bunoh.' A photostat copy of the said letter with Normala's explanatory note dated 8 September 1987 is annexed hereto and marked as 'CRI'.

(6) We deny para 4(ii) of the applicant's further affidavit. We are advised and verily believe that the purported marriage between the applicant and Normala bte Jusoh in Patani was never consummated and therefore Normala was not pregnant. In consequence she never had an abortion upon her return to Pendang, Kedah.

(7) In regard to para 4(iii) of the applicant's further affidavit, we state that Normala bte Jusoh was kidnapped and brought forcibly to Patani by the applicant and that she did not voluntarily consent to the marriage. We are advised and verily believe that the undated letter referred therein was written by Normala bte Jusoh at Patani under threat of death. We have since verified the matter with her and it is now established that she was forced to write the said letter and in her own words (in the explanatory note dated 8 September 1987) she said succinctly, 'Surat ini juga di tulis cara paksaan ... Saya juga telah di ugut, sekiranya saya tidak menulis surat ini saya akan dibunoh.' A photostat copy of the said letter with Normala's explanatory note dated 8 September 1987 is annexed hereto and marked as 'CR2'.

(8) In regard to paras 4(iv) and 4(v) of the applicant's further affidavit, except that the parties surrendered themselves to the police at Pendang, we deny that Normala was forcibly separated from the applicant by her father and family. We are advised and verily believe that Normala bte Jusoh willingly followed her father and stayed with him (Jusoh bin Man) after the marriage for a period exceeding six months. We are further advised and verily believe that it was the desire of Normala bte Jusoh not to live with the applicant as husband and wife.

(9) We deny para 6 of the applicant's further affidavit and repeat paras 5, 6, 7 and 8 as stated above.

(10) In regard to para 8 of the applicant's further affidavit, we are advised and verily believe that it is the prerogative of the registrar under s 23(1)(b) of the Islamic Family Enactment 1979 to obtain further details of the said marriage before registration in view of the chequered history of the parties to the marriage. And this can only be effected by registering the matter as Kes Mal (P) 2/86 as allowed under s 21(i) of the Mahkamah Syariah Enactment 1983.

(11) In regard to paras 11 and 12 of the applicant's further affidavit, we state that Kes Mal (P) 2/87 was adjourned on the request of the applicant on 7 April 1987 and therefore the case is still pending before the Kadi's court at Pendang, Kedah. In the circumstances, we are advised and verily believe that this honourable court has no jurisdiction to adjudicate on this matter.

(12) We admit receiving the letter from the applicant as stated in para 13 of the applicant's further affidavit but state that the applicant is not entitled to express an opinion that '... walhal saya masih menjadi suaminya yang sah di sisi Syarak ...' because the matter (vide Kes Mal (P) 87) is still pending at the Kadi's court in Pendang.

(13) In regard to para 16 of the applicant's further affidavit, we repeat our assertions in para 29 of our affidavit in reply affirmed on 24 August 1987.

(14) We pray that the applicant's application be dismissed with costs.

(15) We also pray for such other relief or order as this honourable court may be pleased to make.

On 12 September, the application for order of mandamus to compel the first and second respondents to register the foreign marriage solemnized on 15 January 1986 was heard before me. In the course of the hearing counsel for the applicant, Encik Ahmad Farid, and the Hon'ble State Legal Adviser, Encik Abdul Malik bin Haji Ishak, for the respondents respectively argued and submitted as follows:

Counsel for the applicant submits as follows:

The applicant contracted a marriage on 15 January 1986 with Normala bte Jusoh. The marriage was solemnized in Patani, Thailand. They were married according to the Muslim rites. A marriage certificate was duly issued by the Majlis Ugama Islam, Changwad, Patani, Thailand. On their return to the State of Kedah, immediately the applicant went before the Pendang Kadi, the first respondent, as the ex-officio Registrar of Marriage in the State of Kedah. The purpose is to register the marriage.

He filled the form for registration of marriage and presented it before the first respondent together with the marriage certificate. Thereafter the respondent did not register the marriage but instituted a proceeding to have the marriage validated. This was vide Kes Mal (Civil Case) (P) No 2 of 1986. Thereafter after seeking the advice of his solicitor the applicant withdrew the case. Subsequently the applicant was urged by the first respondent to file a fresh application for the registration of marriage which he did. Again the marriage was not registered but he instituted another proceeding and registered as Kes Mal (Civil Case) (P) No 6/87.

Again after getting the advice of his solicitor the applicant withdrew his application. In the meanwhile the application for registration of the marriage was refused by the first respondent and until today it has not been registered.

The first respondent gave no sound reason apart from referring to s 25(6) of the Islamic Family Enactment 1979. The applicant being aggrieved by the non-performance of the public duty of the first respondent seeks an order for mandamus to compel the first respondent to register the marriage.

The second respondent was brought in by virtue of his being the Chief Registrar of Marriage, Divorce and Revocation in Kedah. (Counsel refers to s 23 of the Enactment in issue.) Section 23 is in fact the provision for the registration of marriages solemnized outside the state by a domicile or resident of the state (ss 23(1), (2) and (3)). The applicant's *contention is that s 23 imposes a public duty on the registrar to register the marriage as of right.* The requirement in (a), (b) and (c) in s 23(1) is not a condition precedent to the performance of the duty of a registrar. They merely say that if one or both of the parties attend before the registrar, they merely need to produce the marriage certificate or any evidence oral or written of the marriage (in the absence of the marriage certificate). One or both of the parties need to apply in the Form provided, ie there is a form provided in s 23.

There is another requirement. This is to be satisfied upon request made by the registrar, ie to give any detail as required by the registrar. The applicant has fulfilled the two requirements, ie he has produced the marriage certificate. He has applied on the Form provided.

The third requirement was not asked for by the respondent. The Registrar of Marriage did not ask for any detail. In the circumstance we submit that the registrar should have registered the marriage upon obtaining the marriage certificate and Form for the registration of the marriage. But the registrar did not do this. He went on to request the applicant to institute proceedings against the Majlis to validate the marriage. This is not provided for by s 23 of the Islamic Family Enactment. In the circumstance the registrar was wrong in requesting that the applicant institute proceedings against the Majlis Ugama. (See also s 26 of the Enactment, ie Islamic Family Enactment.) Section 23 only provides for the registration; whether it is valid or otherwise is a different matter altogether.

The respondent in his affidavit states that he is concerned with some reasons for refusing to register the marriage. In his affidavit the second respondent stated that 'because Normala was kidnapped by the applicant they refused to register the marriage'. There was a police report lodged by the father of Normala. The girl was then 17 years old when the marriage was solemnized.

First, when the first respondent refused to register the marriage, nothing whatsoever was mentioned about the kidnap, ie on 31 March 1986. The first time they refused the applicant's application was on 27 April 1986. The second time was on 13 May 1986. *Both letters gave s 25(6) of the Enactment as the reason*, but nowhere was it mentioned in both letters that Normala was kidnapped as a reason. The report was lodged by the girl's father on 14 January 1986 at Pendang Police Station vide Report No 67/86.

The registrar had been made aware of the kidnapping through the report lodged by her father on 14 January 1986. Section 25(6) is a provision for the voluntary registration of Muslim marriages prior to this Enactment under any law. In this case s 25(6) *is not relevant because it refers to registration of marriages prior to the coming into force of this Enactment.* Further the applicant when replying to his second respondent's affidavit deposed that Normala had consented and agreed to the marriage. The applicant produced two letters written by Normala. The first letter was sent to the applicant. This is to the effect that she is requesting the applicant to meet her at Tanah Merah, Pendang, and also suggesting that they get married somewhere.

The second letter was written by Normala herself but signed by the applicant and Normala after the marriage in Thailand. The letter was sent to both their parents.

After the marriage they both stayed in Thailand for about eleven (11) days. Upon their return they both surrendered themselves at Pendang Police Station. The girl's parents were informed. The father and the family forcibly took Normala away leaving the applicant in the police lock-up for one (1) day. There was no action taken by the police for kidnapping. The applicant had not been charged. The applicant had not kidnapped the girl. It was only a fictitious ground as an after-thought. The two letters were written by Normala (the first and second respondents referred to the letters in their joint further affidavit in reply). An explanation note was written by Normala on 8 September 1987 after the further affidavit was served on the respondent.

The note should be disregarded because it is improper for the respondent in their further affidavit to get a third party (ie Normala herself) to write on the same letter long after she had written the very letter. She could not be called to be cross-examined. The proper procedure is to get her to affirm an affidavit and in which case she would be cross-examined. The note is purely hearsay.

The applicant was specially aggrieved by the non-performance of the first and second respondent. He had an immediate interest in this matter. *It is generally the rule that there must be specific demand to the respondent that he perform a duty imposed on him. The respondent here has unequivocally manifested his refusal to comply with that duty.* The application was made twice to the first and second respondents and on both occasions they were refused.

Section 23 of the Enactment provides for the performance of the duty by the respondent. Matters other than in s 23 should not be taken into consideration. In the circumstances I humbly pray that the court grant the order of mandamus as prayed for by the applicant.

Reply by the Hon'ble State Legal Adviser

This is an application for an order of mandamus. Mandamus is specified in the Specific Relief Act 1950 (Revised 1974/Act 137). Section 44 of the Act provides:

'44(1) A judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
Provided that –

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
(c) in the opinion of the judge the doing or forbearing is consonant with right and justice;
(d) the applicant has no other specific and adequate legal remedy; and
(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a judge –

(a) to make any order binding on the Yang di-Pertuan Agung;
(b) to make any order on any servant of any government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that government; or
(c) to make any order which is otherwise expressly excluded by any law for the time being in force.'

See proviso of s 44(1) of the Specific Relief Act which is cumulative in effect. All the conditions must be fulfilled before the applicant can bring his case within the provision of the section. See *Loh Wai Kong* v *Government of Malaysia & Ors* [1978] 2 MLJ 175 at p 176 (left hand column I). See also case of *Koon Hoi Chow* v *Pretam Singh* [1972] 1 MLJ 180 at p 181 para (right hand column). See also *Ng Bee* v *Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ 273 at p 275. The similar principles are in compliance with the proviso to sub-s (1) of s 44 of the Specific Relief Act. Mandamus is discretionary in nature: see *Ng Bee's* case at p 275 (at left hand column, 2nd para, line D).

Being discretionary the order of mandamus should not have been applied for the following reasons.

Firstly, s 45 of the Specific Relief Act lays down the principle to be adopted in an affidavit accompanying the application before the court. The matter has been decided upon by Mr Justice Ajaib Singh in *Ng Bee's* case at p 275, left hand column, second para.

In this application as could be seen from the applicant's affidavit (affirmed on 29 June 1987) s 45 of the Specific Relief Act is not stated. The three requirements are cumulative in effect as stated by Mr Justice Ajaib Singh. In the affidavit of the applicant (the closest in the affidavit to s 45 is para 15 of the said affidavit) which talks about rights in the matter in question ('conjugal' is not a right in the matter in question). The rights are not particularly specified in the affidavit of the applicant, instead they are to be implied by the court.

One of the provisos to s 44(1) of the Specific Relief Act was not complied with. Under s 44(1)(d) it provides that the applicant had no other specific and adequate legal remedy. From the affidavit in reply of the respondent affirmed on 24 August 1987, in particular p 6 of the affidavit in reply, para 19 at the top:

'We are further advised and verily believe that in the event the applicant is unsuccessful in his attempt at

registering the marriage at the Kadi's court at Pendang (vide Kes Mal (P) 6/87) there is an available specific and adequate legal remedy for him, viz the right of appeal to the Court of Appeal as provided for under s 108 of the Islamic Family Enactment 1979.'

In other words there is an available remedy to the applicant if the case is set aside by the respondent: it is by way of an appeal to the Court of Appeal as provided by the Islamic Family Enactment 1979 (see s 108). Since there is a specific and adequate remedy available to the applicant mandamus should not be granted to the applicant: see *Chan Mun Poy* v *Director-General of Telecommunications & Anor* [1981] 2 MLJ 293 at p 294, left hand column, 2nd para.

He should have addressed his case to the Court of Appeal instead as provided by s 108 of the Islamic Family Enactment 1979. The mandamus sought for should not be given pursuant to *Loh Wai Kong* v *Government of Malaysia & Ors* [1978] 2 MLJ 175 relying on 'whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent': see p 180 C-D, right hand column.

Section 23 of the Islamic Family Enactment has two limbs.

First limb

If a person domiciled or resident in this state validly contracts a marriage outside the state in accordance to Hukum Syarak and that marriage is not a marriage registrable under the provision of s 18, he shall within six months after the marriage attend before the nearest registrar appointed under s 29(4) or before the registrar who is most readily available in the foreign country to register his marriage and on registration it shall be deemed a marriage registered under this Enactment unless the registrar is not available or if before the expiry of the six months one or both of the parties to the marriage returns to this state without registering the marriage in that country any one or both of the parties shall attend before any registrar in this state:

(a) to produce before the Registrar a marriage certificate or any evidence oral or written to satisfy the Registrar that the marriage had been solemnized;
(b) to give any detail as required by the Registrar for the registration thereof; and
(c) to apply in the form provided for the registration of the marriage so solemnized.

Both parties must be resident or domiciled in the State of Kedah and not in another state. They must within six months apply for registration which is necessary under the Enactment.

Second limb

Under the regulation, within the six months, the applicant can come to any registrar and produce a marriage certificate and any evidence oral or written that the marriage has been solemnized. In giving details (a), (b) and (c) are conjunctive.

Counsel for the applicant stated that the Kadi did not have to register the application. Any evidence oral or written that the marriage has been solemnized must be supplied. The registrar registered it as Kes Mal No 2/86. Then as Kes Mal No 6/87. (See affidavit in reply of the respondent dated 24 August 1987. See p 3 para 10.) 'We admit para 4 of the applicant's affidavit and state that *the applicant had on 27 January 1986 applied* for registration of his marriage at the first respondent's office. On receipt of the applicant's application, the first respondent's predecessor duly registered it as Kes Mal (P) 2/86 and fixed the case for hearing on 13 May 1986 in order to obtain further detail of the said marriage within the meaning of s 23(1)(b) of the Islamic Family Enactment 1979. This is solely because of the chequered history of the parties to the marriage, in particular of the fact that Normala bte Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized.' (see p 4 para 10) (see p 5 para 15). See further affidavit in reply on 9 September 1987 by the respondent, in particular p 3 para 10. See Mahkamah Syariah Enactment 1983 s 21. I submit that s 23 of the Islamic Family Enactment read together with s 21(i) of the Mahkamah Syariah Enactment 1983 makes it imperative to register the case as Kes Mal.

Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent, I would only refer to s 23(1) of the Islamic Family Enactment. In particular s 23(1)(a) is to satisfy the registrar that the marriage has been solemnized (a requirement of satisfying would involve discretion). Since it involves discretion, on the strength of *Loh Wai Kong* v *Government of Malaysia & Ors* [1978] 2 MLJ 175 mandamus should not be granted to the applicant. Apart from that, it also involves a question of judgment on the part of the Registrar of Marriage. Judgment would be in compliance with s 23(1)(a), namely, any evidence oral or written. This is to be read with (b), ie to give any detail as required by the registrar. Because of the words in s 23(1)(a) and (b) judgment comes into the picture and when judgment is involved, 'mandamus should not be given'.

It was submitted by counsel for the applicant that s 23(1)(b) does not apply because the registrar did not ask any detail from the applicant. In answer I would like to refer to the affidavit of the applicant that was affirmed on 29 June 1987. In the applicant's affidavit they referred to exh 'M7' para (2), 'Dengan ini kamu dikehendaki hadir sendiri atau dengan wakil kamu pada hari, masa dan tempat yang tersebut di atas serta bawa dua orang saksi bersama-sama keterangan yang hendak dibentangkan di dalam Mahkamah ini.' This is an implication in telling that the registrar required the detail in s 23(1)(b).

On the point of mandamus. It is submitted that *Re San Development Co's Application* [1971] 2 MLJ 254 at p 256 (left hand column, para G) is relevant. In the event that mandamus lies the court cannot direct the registrar or the first respondent how and in what manner he is to perform his duty. By mandamus the court can only direct the registrar to perform his duty. In this matter the duty is to register the foreign marriage. The court can only ask him to do his duty and no more. The court cannot direct the registrar to perform it in a particular way.

Jurisdiction of the court

It is my submission that Islamic law being a personal law the High Court prima facie does not have jurisdiction to exercise the powers of the Syariah Court. Only Muslim courts established by state authorities has jurisdiction over Muslims. (See Tun Mohd Suffian bin Hashim, *An Introduction to the Constitution of Malaysia*, 2nd Ed, p 248, paragraph under headings 'Islam A State Subject' and 'Muslim Courts'.)

The High Court has no jurisdiction. Islamic law is a personal law and the High Court prima facie does not have jurisdiction to have the powers of the Syariah Court. Only the Syariah Court established by the state authorities has jurisdiction over the Muslims. On this point see Tun Mohd Suffian bin Hashim, *An Introduction to the Constitution of Malaysia*, 2nd Ed, p 248 under 'Muslim Courts'. According to Tun Suffian, 'Of significance is the qualification that Muslim courts established by state authorities have jurisdiction only over Muslims and have no jurisdiction in respect of offences except in so far as conferred by federal law.'

In this case since the parties are Muslims, the right forum is the Syariah Court. On the basis of the affidavit of the respondent it is clear the case before the Kadi had not been disposed. In fact it is part heard.

Secondly, the Ninth Schedule of the Federal Constitution, Federal List I, item 4(e).

State List II

Only matters falling under List I, para 4(e) of the Ninth Schedule, and List II of the state List para 1 spell out the Muslim matters on which the State has jurisdiction. Islamic law is under the prerogative of Tuanku and this is so by virtue of the Constitution of Kedah, art 33B(1), State Constitution of Kedah.

Jurisdiction

Conjugal rights is a matter on which the High Court has no jurisdiction to adjudicate upon.

To determine whether or not an order of mandamus should issue against both the respondents to compel them to register the applicant's marriage to Normala bte Jusoh, the legal position pertaining to a number of aspects relevant to the application including the law relating to the powers and jurisdiction of the court before which the application for the order of mandamus is made as well as the jurisdiction and powers of the authorities against which the order of mandamus is to be issued, must be considered.

Order 53 of the Rules of the High Court 1980 spells out in detail the provisions pertaining to the conditions, time, and mode of applying for an order of mandamus. At the outset procedure wise, it would seem that the applicant was on the right track when he made the application to this court for an order of mandamus to issue against the first and second respondents to compel them to register the applicant's marriage to Normala bte Jusoh. However, before considering the question of the jurisdiction of this court to entertain the application, it is proposed to consider first the relevant provisions of the law under which the first and second respondents were supposed to comply with, and thereby act upon the application made by the applicant for the alleged non-compliance with which the application for an order of mandamus was made against them. The law in question is s 23 of the Kedah Islamic Family Enactment No 1 of 1984 which provides as follows:

23(1) If a person domiciled or resident in this State validly contracts a marriage outside the State in accordance to Hukum Syarak and that marriage is not a marriage registrable under the provision of section 18, he shall within six months after the marriage attend before the nearest registrar appointed under section 29(4) or before the registrar who is most readily available in the foreign country to register his marriage and on registration it shall be deemed a marriage registered under this Enactment unless the registrar is not available or if before the expiry of the six months one or both of the parties of the marriage returns to this State without registering the marriage in that country any one or both of the parties shall attend before any registrar in this state –

(a) to produce before the registrar a marriage certificate or any evidence oral or written to satisfy the registrar that the marriage had been solemnized;
(b) to give any detail as required by the registrar for the registration therefore; and
(c) to apply in the form provided for the registration of the marriage so solemnized.

(2) The registrar may exempt the attendance of one of the parties to the marriage if he is satisfied that there are adequate and valid grounds that prevented him from attending and in such circumstances in the district register shall be entered a record the reason why the person is absent.

(3) Soon after the registration of the marriage is made under this section and on payment of the fees prescribed the registrar shall –
(a) issue a certificate in the form provided to both parties to the marriage; and
(b) forward a copy of the entry made in the district register to the chief registrar who shall enter the entry in the central register.

(4) If the parties to the marriage required to be registered do not make an application for registration within the time prescribed by subsection (1), the marriage may, on application to the registrar and after payment of a penalty prescribed, be registered.

Section 23 of the Islamic Family Enactment therefore confers on the person domiciled or resident in the State of Kedah who have contracted a valid marriage outside the state in accordance with Hukum Syarak, the right within six months after the marriage to attend before the nearest registrar appointed under s 20(4), or before the registrar who is most readily available in the foreign country, to register his marriage, and on registration the marriage shall be deemed a marriage registered under this Enactment. Alternatively, in the event that the registrar is not available or before the expiry of the six months one or both of the parties of the marriage returns to the state without registering the marriage in that country, any one or both of the parties shall attend before the registrar in the state and (a) produce before the registrar a marriage certificate or any evidence oral or written to satisfy the registrar that the marriage had been solemnized; (b) give any details as required by the registrar for

registration of the marriage and (c) to apply in the form provided for the registration of the marriage so solemnized.

In this particular case, the applicant had resorted to the alternative procedure provided under s 23 in order to get this marriage solemnized in Patani, Thailand, registered by the respondents. There is no doubt that the applicant had complied with the requirement under cl (a), ie produce before the registrar, the respondent, a marriage certificate that should have *satisfied* the respondent that the marriage had been solemnized. There is no doubt also that the applicant had applied for registration of his marriage in the form provided under cl (c). However, the registrar is also entitled to require the applicant, if he so wishes, to give any detail as he required under cl (b). Assuming that all the prerequisites having been complied with by the applicant, and barring any untoward incident or circumstances, there is no reason why the registrar should not register the marriage and issue the certificate in the form provided to both parties to the marriage as well as forward a copy of the entry made in the district register to the chief registrar who should enter the entry in the central register under s 23(3).

Be that as it may, whether or not the registrar, or the chief registrar, ie the respondents in this case, should or should not register the applicant's marriage depends very much on whatever information he might have obtained from the available sources. I would say the registrar in this case both the respondents are not bound, as a matter of course, to register the marriage if their investigation revealed that this is not a case in which they should act to register the marriage in compliance with s 23 of the Islamic Family Enactment 1979. In other words the registration of the marriage at the instance of the applicant is not a matter of automatic right. A lot depends on the discretion of the registrar or the respondents in this case, the exercise of which depends very much on whatever information is available to them as he is entitled to require the applicant to give any details which he may require before taking any action to register the marriage. It would not be wrong to suggest that if the registrar is not fully satisfied, and in this case, the respondents if they are not satisfied that this is a case which would warrant the marriage to be registered, they have every right to refuse to register the marriage. Indeed they did not act immediately to register the marriage, wrongly giving s 25(6) of the Islamic Family Enactment as the reason for not doing so. Section 25(6) of this Act provides:

> A registrar shall not register any marriage under this section if he is satisfied that the marriage is not recognized under the provisions of this Enactment.

This is only in respect of voluntary registration of Muslim marriages prior to this Enactment under any law and is therefore irrelevant for the purpose of registering of marriage under this Enactment. Be that as it may any person aggrieved by any decision of any court should first exhaust the remedy available under the law itself, ie the Islamic Family Enactment 1979 since under s 108:

> Any person aggrieved by any decision of any court, Kadi or registrar may appeal to the Court of Appeal and in accordance with the procedures provided by law relating to civil and criminal proceedings.

However, before considering whether this is a case in which the applicant should resort to the Court of Appeal as an aggrieved party, it is worth the while to examine the grounds and the circumstances resulting in the applicant's marriage not as yet being registered by the respondents. For this it is necessary to examine briefly the outline of the historical background leading to the application for an order of mandamus made by the applicant.

It may be recalled that the applicant's counsel had purported to simplify his client's case by arguing that this is simply a matter in which both the respondents had been indolent in refusing to register the applicant's marriage when they were duty bound to do so under s 23 of the Islamic Family Enactment 1979 and as such the counsel for the applicant had taken up this originating motion to compel both respondents to register the applicant's marriage to Normala bte Jusoh by way of the order of mandamus through this court. But this is not such a simple case as the counsel for the applicant had tried to make it. There is more to it than meets the eye.

In the first place, there is a question of the provisions of cll (a), (b) and (c) to s 23(1) of the Islamic Family Enactment 1979, particularly the prerequisites spelt out in cl (b) to that section which requires any one or both of the parties to give any details as required by the registrar for the purpose of registration. If it turns out that the details given are insufficient or any details being supplied are not as required or do not satisfy the registrar, obviously he is not bound to register the marriage. As such it cannot be said that the registrar is duty bound at all costs to register the marriage despite the lack of any necessary information, as required under cl (b). That being the state of affairs it cannot also be said that to get the foreign marriage registered by the registrar is a matter of unequivocal or inherent right not to be denied (an undeniable right) to the applicant by the registrar, and that the registrar must act automatically to have the marriage registered irrespective of the circumstances he found himself in or confronted with, when the application was made.

To ascertain the reasons or the grounds behind his refusal or reluctance to register the applicant's marriage to Normala bte Jusoh, the circumstances which both

respondents found themselves confronted with need therefore to be considered. It all started, it may be recalled, the applicant, Mansor bin Mat Tahir and the girl were desirous of contracting a marriage without a blessing of the girl's parents because by way of affidavit filed on 8 September 1987 the applicant eventually admitted under cl 4(i) of his further affidavit '... that it was on Normala's suggestion that we elope to Patani, Thailand to get married'. (See photocopy of the letter from Normala bte Jusoh to the applicant produced and annexed and marked as 'MMT-1'.) In para 6 of the same affidavit, the applicant had also stated that '... my parents had on two (2) occasions approached Normala's family with the view to asking for her hand in marriage but her parents had on both occasions refused the same. I further state that because of her parents' refusal Normala and I decided to go to Thailand to get married by 'wali tahkim'. This therefore confirms the fact that in the first place the marriage of the applicant to Normala did not start on a healthy basis in view of the latter's parents' lack of blessing. When a marriage is contracted by way of 'wali tahkim' which means, (as explained in cl 8 of the respondents' joint affidavit in reply filed on 24 August 1987), '... the bride can on her own accord appoint the Imam as her wali tahkim and on her own accord request the Imam to marry her to the man of her own choice', the bride's consent, whether or not they were voluntarily and willingly given, becomes a pertinent issue. Since the applicant's marriage took place in Patani, Thailand against the wishes of the girl's parents this should give the respondents strong cause to doubt whether the girl had willingly given her consent to marry the applicant, even though the applicant had produced a marriage certificate issued by the Majlis Ugama Islam Changwad, Patani, Thailand. Indeed both the respondents had strong reasons to doubt whether the marriage was solemnized in accordance with Hukum Syarak to 'wali tahkim' on being 'advised and verily believed that Normala bte Jusoh, a Form Five student of Sekolah Menengah Pendang, Kedah was kidnapped by the applicant on 14 January 1986 at 7.00 am and Jusoh bin Man, the father of the girl had lodged a police rreport to this effect (a photostat of the certified true copy of the police report is annexed and marked 'KDP 1' to the respondents' joint affidavit). The fact that Jusoh bin Man, Normala's father, was subsequently informed by the senior assistant teacher of Sekolah Menengah Pendang that his daughter was absent from school for ten days without reason tended to arouse further the respondents' suspicion and to make them doubt whether the so-called marriage solemnized through 'wali tahkim' was validly solemnized. (See photostat translation of the letter by the sworn interpreter of the High Court annexed as 'KDP 2A'.)

Though there was a marriage certificate of the foreign marriage which has been tendered by the applicant pursuant to s 23(1)(a) when he applied for the registration of his foreign marriage to Normala bte Jusoh, it has been contended by both the respondents that 'the marriage certificate referred therein contained a repudiatory clause, namely, 'the Imam of the Province Islamic Committee Division to accept Normala's complaint when the parties do not live as husband and wife for more than six months (provided there is a witness to the complaint) and the marriage shall then be repudiated by one Talak'. And every time the applicant reverted to Normala without her consent, she shall be repudiated by one Talak. (See a photostat copy of the marriage certificate annexed as 'KDP 3', and translation of the marriage certificate by the sworn interpreter of the High Court Alor Setar annexed and marked as 'KDP 3A'). The fact that they did not live as husband and wife together after their foreign marriage and that the latter stayed with her father for a period exceeding six months would be a strong cause for the repudiatory clause, a condition attached to their marriage, to operate.

Nevertheless, it may be recalled that both respondents admitted in their joint affidavit, para 4 of the applicant's affidavit accompanying the application for leave to apply for an order of mandamus in which the applicant stated that upon his return to the State of Kedah, Malaysia, the applicant immediately attended before the first respondent to register his marriage whereupon the first respondent instituted proceedings to have the said marriage validated via Kes Mal (P) 2/1986. The application to have the marriage registered was registered by the first respondent as Kes Mal (P) 2/86 and he fixed the case for hearing on 13 May 1986 in order to obtain further details of the said marriage within the meaning of s 23(1)(b) of the Islamic Family Enactment 1979. It was further stated in cl 10 of the respondents' joint affidavit that, 'This is solely because of the chequered history of the parties to the marriage, in particular the fact that Normala bte Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized.'

The event that followed thereafter was that the applicant through his counsel M/s Radzi Sheikh Ahmad, Noor & Farid withdrew Kes Mal (P) 2/86 on 1 April 1986 and the first respondent's predecessor approved the withdrawal on 27 April 1986 (photostat copy of letter dated 1 April 1986 from M/s Radzi Sheikh Ahmad, Noor & Farid withdrawing Kes Mal (P) 2/86 is annexed as as 'KDP 4'). (A photostat copy of the first respondent's predecessor approving the withdrawal of Kes Mal (P) 2/86 is annexed as 'KDP 5').

To complicate the matter further both respondents had stated in para 13 of the joint affidavit that they had been advised and verily believed that on 5 September 1986 Normala bte Jusoh had obtained a divorce of one

Talak from the applicant on the basis of her complaint of 'Taklik' (repudiatory act) at the Kadi's office at the district of Chenak in the province of Thailand. (A photostat copy of the divorce certificate vide Vol 24 No 1199 annexed as 'KDP 6' a photostat translation of a divorce certificate is annexed and marked as 'KDP 6A'.)

Paragraph 14 of the respondents' joint affidavit stated that 'on 21 January 1987 armed with the divorce certificate Normala bte Jusoh applied to the Kadi's court at Pendang to confirm her divorce. Her application was duly registered as Kes Mal (P) 5/87'. The first respondent fixed the date of hearing on 7 April 1987 at the Kadi's court, Pendang. On the day of hearing on 7 April 1987, the first respondent adjourned the matter till 28 August 1987 because of the High Court case OM 32-09-87. At that time leave was not yet granted to the applicant under O 53 r 1(1) of the Rules of the High Court 1980. To date Kes Mal (P) 5/87 has been adjourned sine die.

The event that transpired thereafter, according to para 15 of the joint affidavit of both respondents states that on 5 January 1987, the applicant re-applied to register his marriage at the Kadi's office at Pendang. The applicant's application was duly registered and fixed before the Kadi at Pendang on 26 January 1987 in order to obtain further details of the said marriage within the meaning of s 23(1)(b) of the Islamic Family Enactment 1979. The reason stated for this exercise is solely because of the chequered history of the parties to the marriage, in particular the fact that Normala bte Jusoh was alleged to be kidnapped on 14 January 1986 before the marriage was solemnized as stated earlier. On 26 February 1987 the hearing of Kes Mal (P) 6/87 was conducted and was partly heard and adjourned for continued hearing on 21 July 1987. But on 7 April 1987 the applicant without assigning any reason applied for the adjournment of the case. The first respondent approved the case for adjournment (a photostat copy of the request of Kes Mal (P) 6/87 is annexed as 'KDP 7' and a photostat copy of the translation is annexed as 'KDP 7A' to the respondents' joint affidavit).

As a matter of fact the applicant's matter vide Kes Mal (P) 6/87 is still pending and the hearing has been adjourned on the request of the applicant himself. As such the outcome of the hearing of the applicant's application for the registration of his marriage to Normala bte Jusoh has yet to be determined by the first respondent. It would not be an over-statement to say that at this juncture it is still premature for the applicant to seek a remedy in the High Court by way of order of mandamus because it would appear that this is not a case in which both the respondents had utterly and absolutely refused to register the applicant's marriage but because they had strong reasons for not rushing into the matter, particularly having regard to the fact that the matter had been made further complicated by the fact that in the meanwhile 'Normala bte Jusoh had married her fiancee, Osman bin Omar, in the Mukim of Menan, Province of Sengora, Thailand on the 6th day of Rejab, 1407 Hijrah (equivalent to 6 March 1987) with $3,684 as dowry in cash and expenses, the second marriage to Osman bin Omar. According to para (iv) of p 24 of the respondents' joint affidavit she had the blessing of her father, Jusoh bin Man who officiated as 'wali nikah' (marriage guardian) in the marriage ceremony. (A photostat copy of the marriage certificate of Normala bte Jusoh and Osman bin Omar vide Jilid 12 is annexed as 'KDP 8'.) (A photostat copy of the translation of the marriage certificate by the sworn interpreter of the High Court, Alor Setar is annexed as 'KDP 8A'.)

According to para 25 of the respondents' joint affidavit they have been advised and verily believed that on 27 May 1987 Osman bin Omar made an application at the Kadi's office at Pendang to register his marriage to Normala bte Jusoh. The application was registered by the first respondent as Kes Mal (P) 28/87. The date of the hearing has yet to be fixed (a photostat copy of the letter dated 27 May 1987 from Osman bin Omar is annexed as 'KDP 9').

To make matters even more complicated than ever, we have para 26 of both the respondents' joint affidavit stating that 'we are advised and verily believe that Osman bin Omar and Normala bte Jusoh lived happily as husband and wife till today. And that on 3 July 1987 Normala bte Jusoh had a miscarriage while carrying the child of Osman bin Omar. We are further advised and verily believe that Normala bte Jusoh is presently in the early state of pregnancy', ie carrying a child by Osman bin Omar. According to para 28 of the respondents' joint affidavit they have been 'advised and verily believed that Normala bte Jusoh on her own accord decided to stay with her father on her return to Malaysia and that by a fluxion of time and by the events that transpired subsequently she is currently the lawful wife of Osman bin Omar'.

Presented with the circumstances of the chequered and dubious history of the applicant's marriage alleged to have been contracted by the applicant in a foreign country followed by events, some of which admittedly are beyond the control of the applicant, Mansor bin Md Tahir, and also those concerned with the application for the registration of the marriage, namely the first and the second respondents, any question of law apart, it is not surprising that both respondents had not as yet registered the applicant's foreign marriage to Normala for reasons it seems that both the respondents can be said to be entirely at fault.

It could be that both respondents were in the wrong in the first place in not having registered the applicant's marriage to Normala when the application was before them. If the respondents were truly wrong the question is, has the aggrieved party any remedy, if so under which law. Apparently s 108 of the Islamic Family Enactment 1979 provides that 'any person aggrieved by any decision of any court, Kadi or registrar may appeal to the Court of Appeal'. Since an internal or local remedy is still available under the Islamic Family Enactment 1979 and has not been exhausted the aggrieved party, in this case, the applicant, should have in the first place exhausted the remedy available under the Enactment, and appeal against the decision of the respondents to the Court of Appeal in accordance with the procedure provided by law relating to civil and criminal proceedings. Since no decision as yet has been made by the respondents because Kes Mal (P) 6/87 is still pending because the hearing had been adjourned on the request of the applicant it cannot be said that there has been a decision made by the respondent not to the applicant's liking for which an appeal lies to the Court of Appeal at the instance of an aggrieved party or parties.

I now wish to turn to the point of law and the provisions of law relevant to this case, other than s 23 of the Islamic Family Enactment, the spirit, object and content of which I have discussed at some length earlier. Section 44 of the Specific Relief Act 1950 (Revised 1974/ Act 137) seems to empower a judge to make an order requiring any specific act to be done or forborne by any person holding a public office whether of a permanent or a temporary nature, or by corporation or any court subordinate to the High Court, (provided the proviso to that section has been complied with) *among which,* includes the fact that the application for such an order has been made by a person whose personal right, inter alia, would be injured by the forbearing or doing of the said specific act, the applicant has no other specific and adequate remedy, and the order applied for will be complete. Apparently, according to *Loh Wai Kong* v *Government of Malaysia & Ors*,[1] the five conditions contained in the proviso of sub-s (1) of s 44 of the Specific Relief Act 1950 which are cumulative must be fulfilled before the applicant can succeed in bringing this case within the purview of the Act. (See also *Koon Hoi Chow* v *Pretam Singh*[2] and also *Ng Bee* v *Chairman, Town Council, Kuala Pilah*[3].) Section 45 of the Specific Relief Act 1950 sets out the procedure to be adopted in an application under s 44(1) of the Act. The application must be accompanied by an affidavit of the person injured stating his right in the matter in question demanding the justice and the denial thereof. The High Court's power to make an order compelling a public officer to perform his duty is discretionary. Before the court may consider exercising its discretion in favour of granting the order, it must be satisfied that the applicant has a right to the performance of a duty under any law by a person holding a public office. The court must also be satisfied that all the conditions laid down in the provisos to s 44(1) of the Specific Relief Act are fulfilled' (per Ajaib Singh J).

It is contended for the respondents that the closest to the requirement of s 45 of the Specific Relief Act is para 15 of the applicant's affidavit affirmed on 29 June 1987. But argued the Honourable State Legal Adviser for both the respondents that conjugal right is not a right in the matter in question. In other words, the registration of the applicant's marriage to Normala bte Jusoh is not a personal right within the purview of s 44(1)(a) of the Specific Relief Act 1950, though the right to be with his lawfully wedded wife is a conjugal right personal to the applicant.

The other requirement of s 44(1)(d) is that the applicant has no other specific and adequate legal remedy. But from the respondents' affidavit in reply affirmed on 24 August 1987, it has been contended at para 19, p 6, thus:

> We are further advised and verily believed that in the event the applicant is unsuccessful in his attempt at registering the marriage at the Kadi's court at Pendang (vide Kes Mal (P) 6/87) there is an available specific right of appeal to the Court of Appeal as provided for under s 108 of the Islamic Family Enactment 1979. Since there is a specific and adequate remedy available to the applicant when marriage should not be granted to him, *Chan Mun Poy* v *Director-General of Telecommunications & Anor* [1981] 2 MLJ 293 in which Wan Suleiman FJ, as he then was, stated, inter alia:
>
> 'Apart from anything else, he could, if what he alleges is true, have his remedy in an action for breach of contract. I would therefore not be able to assert that he has 'no other specific and adequate remedy' a condition necessary to entitle a person to apply for relief under s 44(1) of the Act'. Similarly 'any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by machinery of an order under s 44 of the Specific Relief Ordinance. Mandamus does not lie to enforce a civil liability arising out of a breach of contract to enforce rights based on contract. A civil suit for damages or for enforcement of a civil liability may be the only proper remedy in such a case': per Sharma J in *Koon Hoi Chow* v *Pretam Singh* [1972] 1 MLJ 180.

It was also argued for both respondents following Sharma J (as he then was in *Koon Hoi Chow* v *Pretam Singh*[2]) that there are two more prerequisites essential to the issue of an order under s 44 of the Specific Relief Act, namely:

(i) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and
(ii) whether the applicant has any remedy other than by way of mandamus, for the enforcement of the right which has been denied to him.

Since this is not such a case in which the respondents' duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondents, mandamus ought not to be given.

For the applicant, it was argued by his counsel that s 23(1)(b) of the Islamic Family Enactment does not apply because the respondents did not ask for any detail from the applicant. In reply, the Hon'ble State Legal Adviser referred to exh MM7 para 2 annexed to the applicant's affidavit affirmed on 29 June which states:

> Dengan ini kamu dikehendaki menghadirkan diri pada masa dan tempat yang tersebut di atas serta membawa dua orang saksi bersama-sama keterangan yang dibentang di dalam Mahkamah ini.

For the respondent it was argued that by way of implication the respondent required the details under s 32(1)(b).

Turning to the question of jurisdiction it is argued for the respondents that Islamic law being a personal law prima facie the High Court does not have jurisdiction to exercise the power of the Syariah Court. Only Muslim courts established by state authority have jurisdiction over Muslims. Reference was made to *An Introduction to the Constitution of Malaysia*, 2nd Ed, p 248 by Tun Mohd Suffian bin Hashim under the heading 'Islam A State Subject' which means that only the state has legislative and executive authority over it. The federal government has not (except in the federal territory). The State List, which enables matters in respect of which a state legislature has power to make law, spells out the Muslim matters over which a state has jurisdiction. These are some of the matters: Muslim law and personal and family law for Muslims, ... Muslim court ... the determination of matters of Muslim law. As such it was further argued for the respondents that the High Court does not have jurisdiction, Islamic law is a personal law and the High Court does not have any jurisdiction nor the power of the Syariah Court. Only Syariah Courts established by the state authority have jurisdiction over the Muslims. To enforce this argument the Hon'ble State Legal Adviser quoted a passage from the same book under the heading of 'Muslim Court' in which it is stated that:

> Of significance is the qualification that Muslim courts established by state authorities have jurisdiction only over Muslims and have no jurisdiction in respect of offences except in so far as conferred by federal law.

In this particular case, it was argued for the respondents that the parties are Muslims, the right forum is the Syariah Court and on the basis of the affidavit of the respondents it is clear that the case before the Kadi had not yet been disposed of, it is in fact part heard.

The Ninth Schedule to the Federal Constitution in Federal List I, item 4(e) indicates that Islamic personal law relating to marriage, divorce etc are excluded but included in State List II. Also included in the State List are matters pertaining to the constitution, organization and procedure of Syariah Courts, which have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in the paragraph. This provision as well as art 33(B)(1) of the Kedah State Constitution tends to reinforce the respondents' argument that the applicant's conjugal right is a matter over which the High Court has no jurisdiction.

To summarize all the various arguments for and against the applicant against the background, antecedents, chequered history and circumstances of the applicant's foreign marriage to Normala bte Jusoh across the border in a situation which was somewhat similar to at one time the well-known Gretna Green marriage across the English border in Scotland, it may be said that the law requires the applicant to register his marriage to Normala bte Jusoh before the expiry date of six months upon producing before the registrar a marriage certificate or any evidence oral or written to satisfy the registrar that the marriage has been solemnized (s 23(1)(a)). The application for registration must of course be made in the form provided for the registration of the marriage so solemnized (s 23(1)(c)). Under s 23(1)(b), the applicant is to give any details as required by the registrar for the registration of marriage. Upon being satisfied with all the prerequisites the registrar may (as a matter of discretion and judgment, but not as a duty of an imperative ministerial character involving no judgment or discretion on the part of the respondents) register the marriage. In this case both the respondents chose to seek further information and the attendance of two witnesses besides the applicant before proceeding to hear the applicant's application. This is because the marriage was alleged to have been solemnized in accordance with 'Hukum Syariah' through "wali tahkim' which involves the bride appointing on her own accord the Imam as her 'wali tahkim' and on her own accord request the Imam to marry her to the man of her own choice. This was as a result of an allegation being stated as well as a report being made of the girl having been kidnapped and was missing from school as well as threatened to agree to marry the applicant. Somehow or other both respondents never got down to hearing the case because each time the case was registered, the applicant, through his counsel decided to withdraw the first suit and subsequently when another suit was filed, the applicant, through his counsel, decided to have it withdrawn again. In the interim period it was alleged that Normala bte Jusoh instituted a complaint and had her marriage repudiated under the repudiatory clause, a condition of the foreign marriage, as six months have lapsed during which she has been separated from the applicant, and subsequently she was legally divorced from the applicant. To make matters worse,

Normala had in the meanwhile contracted another marriage with Osman bin Omar with the blessing of her parents. She is now living apparently with her husband and is in the family way. In fact her second marriage to Osman bin Omar is waiting to be registered.

In view of what I have said, it cannot be truly ascertained that both the respondents have not performed their duty as 'an imperative ministerial character involving no judgment or discretion on their part'. Besides three conditions required under s 44 as well as s 45 of the Specific Relief Act 1950 have not been complied with in the sense that the enforcement of the right has been denied to the applicant. If at all in this case the respondents had not made the right decision, the applicant should have appealed to the Court of Appeal under s 108 of the Islamic Family Enactment. But in reality the respondents have yet to hear the applicant's application for the registration of his marriage to the girl Normala bte Jusoh. The case is in fact pending. Under such circumstances it is even doubtful whether there is any right of appeal for him to the Court of Appeal under that section. Unfortunately for the applicant, the turn of events, ie Normala's repudiation of her marriage to the applicant and divorce and her subsequent marriage to Osman bin Omar by whom she is now in the family way, had frustrated his dire effort to be with her as his lawfully wedded wife. What made matters worse, it seems that this case does not fall within the jurisdiction of the High Court to issue an order of mandamus because the parties are Muslims and it involves the personal law of Muslims under the Kedah State Constitution as well as the Federal Constitution as clarified by Tun Suffian in his *Introduction to the Constitution of Malaysia*.

Taking all these into consideration I am of the view that this is not a fit case which would warrant the High Court to interfere by way of compelling both respondents to act to register the applicant's marriage to Normala bte Jusoh. Even if I were to do so and issue an order of mandamus to compel the respondents to register the marriage, it would only be a case of an academic and judicial exercise because there is no more foreign marriage between the applicant and Normala as such to be registered since, it may be recalled, the marriage had been dissolved by way of repudiation of one talak at the instance of Normala bte Jusoh who has since remarried Osman bin Omar, and by whom she is in the family way. What good will it do to insist on registering a non-subsisting marriage.

Accordingly, I dismissed the applicant's application for an order of mandamus with costs.

Application dismissed.

Solicitors: *Ahmad Farid & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Lee Ah Ha

HIGH COURT (IPOH) – PERAK CRIMINAL TRIAL NO 18 OF 1984
ABDUL MALEK J
17 AND 25 MARCH 1988

Criminal Law – Charges of possession of firearms and ammunition – Proclamation of security area – Judicial notice – Publication of proclamation – Laying down before Parliament – Provision directory and not mandatory – Statement from the dock – Evidence Act 1950, ss 56 & 57 – Criminal Procedure Code (FMS Cap 6), s 173(k) – Internal Security Act 1960 (FMS Cap 6), ss 47, 80 & 81

Constitutional Law – Whether proclamation of security area had been laid before Houses of Parliament – Provision directory and not mandatory

In this case the accused had been charged with two charges for possession of firearms and ammunition at Ipoh which was a security area by virtue of PU(A) 148/69. The evidence showed that the firearms and ammunition were found in a plastic bag and purse under the driver's seat of the car belonging to and driven by the accused. The court held that a prima facie case had been established and called on the accused for his defence. The accused elected to make a written statement from the dock.

Held, convicting the accused:

(1) The court has to take judicial notice of all laws and regulations and therefore the proclamation need not be proved in view of s 56 of the Evidence Act 1950;

(2) In regard to the sanction of the Public Prosecutor the crucial factor is the offence itself and not so much the exact details which must be the same as the charges. Although the time and place mentioned in the sanction and in the charges are different, the offence in this case was a continuous one and there was no reason to amend the charges as regards the time and place.

(3) The date of the proclamation was wrongly given in the charge and the court found it necessary to amend the charges as regards the date of the proclamation. It is not, however, strictly necessary to quote the notification references in the charges and therefore the amendment to the charges was purely procedural.

(4) The provision for the laying down of the proclamation before the Houses of Parliament is merely directory and not mandatory and the relevant proclamation is therefore valid without the need to ascertain whether it had been so laid.

(5) The court having earlier found that the prosecution had established a prima facie case against the accused, on the basis of the accused's prepared statement, the court was of opinion that his mere denial through this statement from the dock had not raised any doubt on the prosecution's case. The accused was therefore convicted on the two charges as amended as regards the date of the proclamation.

[*Editorial Note*: The accused has appealed to the Supreme Court vide Criminal Appeal No 19 of 1988.]

Cases referred to

1 *Johnson Tan Han Seng* v *PP* [1977] 2 MLJ 66 (refd)
2 *PP* v *Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 (refd)
3 *Lee Kim Hoong* v *Inspector General of Police* [1979] 2 MLJ 91 (refd)